

taraf Bakhtu is a distinct sub-division of Village Bhumbli and that the plaintiffs possess a preferential right of pre-emption as compared with defendants Nos. 1 to 5.

No other point arises in these proceedings.

For the foregoing reasons the appeal fails and is dismissed with costs.

Fauja Singh
and others
v.
Chanan Singh
and others
(Plaintiffs)
Sohnu and
another
(Defendants)

Harnam
Singh J.

REVISIONAL CIVIL

Before Harnam Singh, J.

Shrimati ANGURI DEVI,—Plaintiff-Petitioner,

versus

GURNAM SINGH,—Defendant-Respondent.

Civil Revision No. 375 of 1949.

Civil Procedure Code (Act V of 1908), section 115—An order demanding additional Court fee—Whether subject to revision under section 115 of the Code of Civil Procedure—Suit for declaration that plaintiff is tenant of the shops in suit and for possession of the shop—Whether falls under section 7 (v) (e) or section 7 (iv) (c) of the Court-fees Act, (VII of 1870)—Distinction between the two clauses of the section.

Held that an order demanding additional Court-fee is subject to revision under section 115 of the Code of Civil Procedure as in a case like this there is a refusal to exercise jurisdiction in the matter and to try the case on the merits unless additional Court-fee is paid.

Bal Krishana Udayar v. Vasudev Ayyar (1), distinguished.

The present suit for declaration that plaintiff was a tenant in respect of the shops in suit and for possession of the shops on the allegation that defendant had unlawfully and forcibly taken possession thereof fell under section 7(v) (e) of the Court Fees Act and not under section 7(iv) (c) of the Act and, therefore, *ad valorem* Court-fee was payable.

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Section 7 (iv) (c) of the Act contemplates a suit in which the declaratory relief is the basic relief and the consequential relief is asked for as incidental to the declaratory relief. Indeed, in order to bring a suit within section 7 (iv) (c) the two reliefs are to be so connected together that if the Court in the exercise of its discretion refuses to pass a declaratory decree the claim for consequential relief fails.

Section 7 (v) (e) contemplates the subject matter of a suit for the possession of a house as being the house as in the present case and, therefore, the suit is governed by section 7 (v) (e).

Mani Lal v. Chandu Lal-Chhotalal (1), relied upon.

Petition under section 44 of Act IX of 1919, Punjab Courts Act, for revision of the order of Shri C. G. Suri, Sub-Judge, 1st Class, Delhi, dated the 15th July 1949, directing the plaintiff to amend the plaint.

H. S. GUJRAL, for Petitioner.

HARBANS LAL SARIN, for Respondent.

JUDGMENT.

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HARNAM SINGH J. To appreciate the point arising in Civil Revision No. 375 of 1949 the material facts of the case must be set out in some detail.

Sharimati Anguri Devi instituted civil suit No. 79 of 1949 on the 2nd of February 1949, for declaration that she was a tenant in respect of the shops in suit and for possession of the shops on the allegation that Gurnam Singh, defendant, had unlawfully and forcibly taken possession of those shops on the 16th of November 1947. Plaintiff also claimed compensation for wrongful use and occupation of the shops at Rs. 75 per month for the period between the 16th of November 1947, and the 26th of January 1949. The suit has been valued under section 7 (iv) (c) of the Court Fees Act at Rs. 900 for purposes of Court-fee and jurisdiction.

Gurnam Singh, defendant, urged a preliminary objection at the trial that the subject-matter of the suit had not been correctly valued for purposes of court-fee and jurisdiction and pleaded that the plaintiff was liable to pay *ad valorem* Court-fee under section 7 (v) of the Court-fees Act on the market value of the shops in suit.

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On the pleadings the trial Court fixed the following issue :

Whether the plaint has been correctly valued for purposes of Court-fee and jurisdiction ?

Finding that the suit fell under section 7 (v) of the Court-Fees Act, 1870, hereinafter referred to as the Act, the trial Court directed the plaintiff to amend the plaint, state therein the market value of the shops in suit, and to pay *ad valorem* Court-fee on that market value by the 3rd of August 1949.

Shrimati Anguri Devi applies to this Court under section 115 of the Civil Procedure Code for the revision of the order passed by the trial Court on the 15th of July 1949.

Mr. H. L. Sarin, learned counsel for the respondent, urges a preliminary objection that no petition for the revision of the order passed by the trial Court on the 15th of July 1949, is competent in this Court. The argument raised is that section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. Basing himself on the decision in *Balkrishna Udayar v. Vasudev Ayyar* (1) Mr. Sarin urges that section 115 is not directed against conclusions of law or facts in which the question of jurisdiction is not involved. I am not impressed with the contention raised.

In a number of cases cited in books it has been said that an order demanding additional Court-fee is revisable under section 115 as in such cases there is a refusal to exercise jurisdiction in the matter and trying

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the case on the merits unless additional Court-fee demanded is paid. Authority for this view is to be found *inter alia* in *Ratnavelu Pillai and another v. Varadaraja Pillai and another*, (1).

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Considering the merits of the case I think that the trial Court was right in holding that the suit falls within section 7 (v) of the Act. In the suit out of which these proceedings have arisen the relief for possession is not incidental to the declaratory relief. Section 7 (iv) (c) of the Act contemplates a suit in which the declaratory relief is the basic relief and the consequential relief is asked for as incidental to the declaratory relief. Indeed, in order to bring a suit within section 7(iv) (c) the two reliefs are to be so connected together that if the Court in the exercise of its discretion refuses to pass a declaratory decree the claim for consequential relief also fails. Considering that this test is not fulfilled in the present case I have no hesitation in affirming the decision of the trial Court that the present suit falls within section 7 (v) (e) of the Act.

Having made these observations I pass on to consider the value that should be put upon the subject-matter of the suit, since under section 7 (v) it is the value of the subject-matter that determines the value of the suit. On this point Mr. Gujral basing himself on the rule laid down in *Ram Raj Tewari v. Gurnandan Bhagat*, (2) *Mst. Barkat-un-Nessa Begum v. Mst. Kaniza Fatima* (3), and *Mohammad Eshaque v. Mohammad Amin* (4) maintains that in the present case Court-fee is to be paid on the value at which the plaintiff values her right to the possession of the shop in suit. In other words the argument raised is that the subject-matter of the suit ought not to be regarded as the two shops with all the rights involved therein but the right of *Shrimati Anguri Devi* to the posses-

(1) 1942 A.I.R. (Mad.) 585.
(2) I.L.R. (1893) 15 All. 603.
(3) 1927 A.I.R. (Pat.) 140.
(4) 1948 A.I.R. (Cal.) 312.

sion of the shops for the period of the lease. As stated above, the real question for determination is the value of the subject-matter of the suit and that involves the determination of the subject-matter itself. In *Ram Raj Tewari v. Gurnandan Bhagat* (1) Mst. *Barkat-un-Nessa Begum v. Kaniza Fatima* (2), and *Mohd Eshaque v. Mohd Amin* (3) subject-matter was not considered to be the property itself although it was of the property itself that possession was sought. In all such cases as appears from section 7 (v) the object of the suit is "the possession of land, houses or gardens" while the subject of the suit is "land, houses or gardens". Clearly the subject of the suit is not the same things the object of the suit. That being so, Court-fee in the present case is to be paid on the market value of the shops in suit. Authority for this proposition is to be found in *Ratilal Manilal v. Chandulal Chhotalal*, (4).

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In coming to the conclusion set out in the preceding paragraph I feel no difficulty for I find that the view I am expressing receives support from the working of section 7 (v) itself. The relevant portion of section 7 (v) provides that the amount of fee payable under the Court-fees Act in a suit for the possession of a house shall be computed, where the subject-matter is a house, according to the market value of the house. In plain English section 7 (v) contemplates the subject-matter of a suit for the possession of a house as being the house and there is nothing in section 7 (v) to suggest that the subject-matter of a suit of the type before me is not the house.

Before leaving this judgment I think it necessary to mention that the construction placed upon section 7 (v) of the Act in the cases upon which Mr. Gujral relies avoids the anomaly of valuing a suit for possession according to the value of the entire interest in the property when possession of that property is

(1) I.L.R. (1893) 15 All. 603.
(2) 1927 A.I.R. (Pat.) 140.
(3) 1948 A.I.R. (Cal.) 312.
(4) 1947 A.I.R. (Bom.) 482.

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sought on the basis of a partial interest therein. In the noble words of Macklin, J., in *Mani Lal v. Chandu Lal Chhota Lal* (1), cases may arise out of section 7 (v), but the law seems to me as I have said and if the law is harsh, it can always be amended.

For the foregoing reasons I dismiss with costs the petition for the revision of the order passed by the trial Court in civil suit No. 79 of 1949 on the 15th of July, 1949.

Time is given till the 2nd of October 1950, to comply with the order passed by the trial Court on the 15th of July 1949, and parties are ordered to appear in the trial Court on the 14th of August 1950.

APPELLATE CIVIL

Before Harnam Singh, J.

PANJABOO,—Defendant-Appellant,

versus

1950
July 12

MALHA SINGH AND OTHERS (PLAINTIFFS) AND Mst. MAINAN AND OTHERS (PLAINTIFFS *pro forma*),—Respondents.

Regular Second Appeal No. 637 of 1946.

Custom—Rajputs of Nurpur Tahsil, District Kangra—Sister and sister's issue—Whether preferential heirs against collaterals of sixth or seventh degree—Non-ancestral estate of the last male holder.

Held that the defendant, the sister's son of the last male-holder, on whom the onus rested, failed to prove that sisters as well their issue were preferential heirs as compared with the collaterals of sixth or seventh degree in the Kangra District in general and among the Rajputs of the Nurpur Tahsil of the Kangra District in particular as regards the non-ancestral property of the last male-holder.

Regular Second Appeal from the decree of the Court of Shri S. S. Dulat, District Judge, Hoshiarpur/Kangra Districts, dated the 30th day of November 1945, reversing